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No. 87-1490

In The

SUPREME COURT OF THE UNITED STATE

October Term, 1988

JOHN E. MALLARD,
Petitioner,

V.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICI CURIAE.

California Attorneys for Criminal Justice (CACJ) and the National Association of Criminal Defense Lawyers, Inc. (NACDL) appear as amici curiae in support of petitioner. CACJ is a statewide organization of approximately 2,000 attorneys whose practices emphasize the defense of individuals accused of crime. The NACDL is a District of Columbia non-profit corporation that represents twenty-seven state and local affiliates and speaks for approximately twenty thousand lawyers in every state of the union, all of whom are primarily engaged in positions bringing them in daily contact with the criminal justice system. Among the stated objectives of both organizations is the promotion of

fairness in the adjudication of criminal cases in the courts of the United States.

Both organizations are vitally concerned with the issues raised by this case. No segment of the bar shoulders a heavier burden of pro bono work than criminal defense lawyers. We consistently accept court appointments to provide competent representation at rates which barely meet our overhead expenses. We frequently volunteer to provide our services at little or no cost to needy clients. We are diligent in working through these and other bar associations for improvements in our system of justice. Our efforts are frequently rewarded with public contempt and governmental indifference. Now a ruling is sought which would permit a court to compel our acceptance of appointments requiring us to serve clients in complex

civil litigation with no compensation or reimbursement, despite our own good faith assessment of our incompetence or other inability or conflicting duty. Before such a ruling is contemplated, we seek leave to raise some serious concerns about the impact such a ruling would have upon the administration of justice, and the ultimate achievement of our goal of maximizing the delivery of competent legal representation to indigent litigants.

QUESTION PRESENTED

Is a federal court empowered by 28 U.S.C. Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel under that statute?

SUMMARY OF ARGUMENT

The essential argument of the petitioner is that, since 28 U.S.C. Section 1915(d) only authorizes a court to "request" an attorney to represent an indigent plaintiff, an unwilling attorney cannot be compelled to accept an "appointment" pursuant to this statute. While amici fully concur in that argument, we would like to challenge the implicit assumption that even where an "appointment" is authorized, an unwilling lawyer can be compelled to accept a client. Amici will suggest that (1) the nature of the lawyer-client relationship precludes a court from forcing a lawyer to accept a client without the lawyer's consent; (2) the ethical responsibilities of a lawyer may require the rejection of an appointment which makes no provision for the reimbursement of out-of-pocket

expenses; (3) the ethical duty to "never reject . . . the cause of the defenseless or oppressed" does not mandate the acceptance of all court appointed clients; and (4) this Court's decision in Ferri v. Ackerman, 444 U.S. 193 (1979), implicitly assumes that appointments to represent indigent clients must be voluntarily accepted by lawyers. If such appointments are to be mandated, then the denial of absolute immunity from malpractice claims established by Ferri v. Ackerman must be reconsidered.

ARGUMENT

I. THE NATURE OF THE LAWYER-CLIENT RELATIONSHIP REQUIRES VOLUNTARY ACCEPTANCE OF COURT APPOINTED CLIENTS BY THEIR LAWYERS.

The acceptance of a client by a lawyer involves a complex set of

professional and personal judgments. Regardless of whether the client has directly approached the lawyer, or has been proffered by an "appointing" or "requesting" court, the lawyer cannot and should not accept a client unless the lawyer concludes that:

(1) The lawyer can provide the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." A.B.A. Model Rules of Professional Conduct, Rule 1.1 (1983). Cf. A.B.A. Model Code of Professional Responsibility, Disciplinary Rule 6-101(A)(1) (1981).

(2) He or she can act "with reasonable diligence and promptness in representing" the client. A.B.A. Model Rules of Professional Conduct, Rule 1.3 (1983). Cf. A.B.A. Model Code of Professional Responsibility, Disciplinary

Rule 6-101(A)(3) (1981). As one court aptly put it, "when an attorney takes on more than he can properly handle, he jeopardizes both his client's cause and the public interest in sound and efficient administration of justice." Lopez v. Larson, 91 Cal. App. 3d 383, 400, 153 Cal. Rptr. 912, 922 (1979).

(3) The intensity of any personal feeling of repugnance for the client or the cause will not impair the effectiveness of the representation of the client. A.B.A. Model Rules of Professional Conduct, Rule 6.2(c) (1983). Cf. A.B.A. Model Code of Professional Responsibility, Ethical Considerations 2-29, 2-30 (1981).

(4) The employment is not adverse to a client, a former client, the lawyer's own self-interest, or any other conflicting interest. A.B.A. Model Rules

of Professional Conduct, Rule 1.7 (1983). Cf. A.B.A. Model Code of Professional Responsibility, Disciplinary Rules 5-101(A), 5-105(A),(C) (1981).

(5) Representation of the client is not likely to result in an unreasonable financial burden on the lawyer. A.B.A. Model Rules of Professional Conduct, Rule 6.2(b) (1983).

The evaluation of these factors requires intensive self-assessment and examination of conscience that only the lawyer involved can perform. The courts must presume that this professional judgment is made in good faith. If a lawyer's assessment of his or her own competency, potential conflicts, existing workload, current financial ability, or intensity of personal feelings is to be ignored or second-

guessed and overridden by an appointing court, the effectiveness of the ensuing attorney-client relationship may be doomed from the start. This is not to suggest that a lawyer is always the final judge of whether he or she is meeting the lawyer's responsibility to serve the public interest. That question might be addressed in a disciplinary proceeding brought by the bar, a forum which protects the lawyer's interest in the privacy of one's financial affairs and conscience, as well as the privacy of the lawyer's other clients who may present problems of conflicts or excessive workload.

The process of judicial appointment, properly conceived, requires a voluntary acceptance of the client by the lawyer. A lawyer is ethically required to decline an appointment if the attorney would be

unable, for any of the reasons outlined, to adequately represent the client. United States v. 30.64 Acres of Land, 795 F.2d 796, 800 n.7 (9th Cir. 1986); United States v. Dolan, 570 F.2d 1177, 1182 (3rd Cir. 1978).

Little authority supports the broad assertion in Powell v. Alabama, 287 U.S. 45, 73 (1932), that lawyers are "bound" to render service when required by court appointment. While the Court cited Cooley, Constitutional Limits, at p. 700 and note, for this proposition, Cooley vastly overstated the tenor of the case law. While contending it is the "duty" of lawyers to accept appointments even when no provision is made for payment, Cooley contended that "[n]o one is at liberty to decline such an appointment." But nearly every case he cited for this dubious proposition involved a denial of

a lawyer's claim for compensation or reimbursement after the lawyer had provided representation to the appointed client.[1]

A century ago, the prevailing method of providing counsel for indigents in criminal cases was for the judge to simply look around the courtroom and press the closest available lawyer-

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[1] See Vise v. Hamilton Co., 19 Ill. 78 (1857) (mis-cited by Cooley as Vice v. Hamilton Co., 19 Ill. 18), denying a lawyer's claim for $20 for defense of accused forger; Wayne County v. Waller, 90 Pa. 99 (1879), refusing a lawyer's claim for reimbursement of $150 expenses incurred in successful defense of woman accused of murder; House v. Whitis, 64 Tenn. (5 Baxt.) 690 (1875) (mis-cited as House v. White by Cooley), refusing the claim for $25 fee by a guardian ad litem appointed to defend a minor in a civil case; and Barnes v. Commonwealth, 92 Va. 794 (1895), upholding failure to appoint counsel for defendant sentenced to death for murder, since record did not disclose request for counsel. Dicta suggests that if a request had been made, counsel could be compelled to accept appointment, citing Cooley.

victim into service. The practice was described by Justice Stephen Field in an opinion he wrote as Chief Justice of the California Supreme Court:

> [I]t is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law. The duty imposed in this way may, it is true, be carried to unreasonable length, so as to become exceedingly burdensome; but we have heard no complaints of this character. It is usual for the Court to apportion the duty among the different members of the profession practicing before it so as to render it as light upon each as possible.

Rowe v. Yuba County, 17 Cal. 61, 63 (1860).[2]

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[2] It is interesting to speculate why Chief Justice Field might have "heard no complaints of this character." It might have been because Field did not take kindly to complaints. See In re Neagle, 135 U.S. 1 (1890). More likely, it was because lawyers got the message delivered in Lamont v. Solano County, 49 Cal. 158, 159 (1874): there should not be any need for reimbursement of expenses in indigent cases because lawyers were not expected to incur any expenses in such cases. The double standard of justice for indigents then in vogue was accurately described by Meyer C. Goldman in The Public Defender, p. 18-20 (1917):

> The classes of lawyers who are usually assigned to defend, present a phase of this question which cannot be regarded as unimportant. It is a regrettable fact that in nearly all communities (particularly in the larger cities) there is a type of lawyers who are not truly representative of a great profession. Their regard for the rights and liberties of their clients is measured solely from a commercial or financial standpoint. These are more persistent than any other lawyers in their search for clients. Too frequently their services, if rewarded by

Undoubtedly, a lawyer who offered a plausible reason to decline an appointment was not dragooned into service. Few cases can be found resembling the instant case, in which a

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> small fees, are half-hearted or openly negligible. This leaves their clients practically or wholly unprotected. They are commonly referred to as "shysters", but also described as "snitch lawyers," "jail lawyers," "vampires," "legal vermin" and "harpies," and by other inelegant but extremely emphatic phraseology. They are grasping and mercenary--without character, ability or conscience. They prey upon the ignorance or fear of the prisoner, or of his relatives or friends, in their effort to extort a fee. If it be not forthcoming (or often when it is) they advise the prisoner to plead guilty, on the pretext that he will get greater leniency from the court than by standing trial. He may at times go through the forms of a trial, but the defense is perfunctory on its face, and the client pays the penalty, perhaps not for the crime charged, but often for his poverty.

lawyer's claim of lack of competence was overruled by a court.

The necessity for appointing courts to defer to the good faith judgments of attorneys who seek to decline appointment has been recognized in the reported decisions of Florida, Ohio and California. In Easley v. State, 334 So. 2d 630 (Fla. Dist. Ct. App. 1976), the Florida District Court of Appeal reversed a judgment of contempt against a lawyer who filed an affidavit of his client concurring in the lawyer's own assessment of incompetence after the trial court had denied a previous motion to withdraw. The trial court interpreted counsel's action as "a scheme to secure release from appellant's obligation as an attorney to assist the court in the representation of indigent criminal defendants." On appeal, the court

concluded that counsel who feels himself incompetent to represent a client, despite a court order to provide such representation, has a duty "to communicate his feelings of lack of competence" to the client:

> There is no finding, nor indeed on the evidence could there be, that appellant did not in good faith feel his inadequacy to handle felonies. Moreover, in accord with the ethical obligations of an attorney, we think it was incumbent upon appellant to communicate his feelings of lack of competence to the defendant Gulvin.

Id. at 632 (footnote omitted). The Florida court recognized that a lawyer's own conclusions about his competency, his conflicting loyalties, his availability and solvency, and his feelings of repugnance are likely to interfere with the lawyer-client relationship, regardless of the fact that an appointing

court may disagree with those conclusions.

> The court's finding of appellant's competence in criminal matters wouldn't make it a fact; and nothing in the evidence impeaches appellant's assertion to the contrary. Furthermore, appellant never actually refused to represent Gulvin in contravention of the court order. He simply informed the defendant, as he should have, that he felt incompetent to represent him and thereafter filed a motion consistent with the desires of his client. He could have done no less and is not guilty of contempt for doing so.

Id. (emphasis in original).

A similar dilemma was presented to the Court of Appeals of Ohio in State v. Gasen, 356 N.E.2d 505 (Ohio Ct. App. 1976). There, the trial court appointed a deputy public defender to represent a criminal defendant over the lawyer's objection that he could not effectively represent the client and that to do so

would violate the Code of Professional Responsibility, since the defendant was already represented by another lawyer who had failed to appear. Id. at 506. Significantly, the court of appeals held that a lawyer's duty to decline to represent a client is no different when the attorney is appointed by the court than it would be if the client walked in off the street:

> Clearly, the ethics of the legal profession demand that any attorney, private or public, decline to represent a party when such attorney is unable, for valid reasons, to fully and adequately prepare such party's case, or when such party is already represented by competent counsel. Failure of an attorney to decline to perform such representation may result in disciplinary measures being taken against him. DR 6-101.

Id. at 507 (emphasis in original). Since the duty to decline employment arises from such a complex matrix of ethical

judgments by the attorney involved, it is difficult to imagine any circumstances where a court would be justified in substituting its judgment for that of the attorney.

In Chaleff v. Superior Court, 69 Cal. App. 3d 721, 138 Cal. Rptr. 735 (1977), a deputy public defender was held in contempt for declining an appointment to serve as "advisory counsel" to a defendant who insisted upon his right of self-representation. Id., 69 Cal. App. 3d at 723-24. Among the reasons cited by the attorney for declining the appointment were conflicts with the client over what defenses or witnesses should be presented, and adverse consequences to the rest of his case load. Id. at 723. The court of appeal vacated the judgment of contempt, concluding that Rule 2-111 of the

California Rules of Professional Responsibility permits a lawyer to withdraw from representation of a client whenever the duty to a client impinges upon the lawyer's ethical responsibility as a member of the bar. Noting that public defenders "are subject to the Rules of Professional conduct governing the action of lawyers no less than other members of the State Bar," the court concluded that Chaleff went as far as he could in disclosing his untenable ethical position without divulging privileged information. Id. at 724.

Reliance upon the appointment system of a century ago also creates a dilemma, if we seek to "apportion the duty" among a large cross-section of the bar and still provide competent representation. A century ago, a large cross-section of the bar could step in and competently

represent a defendant in a civil action for damages. Today, the bar is highly specialized, and the burden of providing competent representation to indigents such as the plaintiffs in this case will necessarily be concentrated on a small proportion of all lawyers. The point was aptly made by Justice Macklin Fleming in Luke v. County of Los Angeles, 269 Cal. App. 2d 495, 74 Cal. Rptr. 771 (1969):

> The complexities of modern society and modern legal practice have increasingly specialized the activities of lawyers and narrowed the area of a particular practitioner's effectiveness. Today law comprehends a myriad of different processes, and lawyers must necessarily specialize in only a few of them in order to achieve and maintain competency in their work. As a consequence their experience at the bar has become fragmented. No longer will it serve for a court to select a lawyer-bystander in the courtroom, since with the best of professional intentions the latter may only be

> qualified to furnish perfunctory and transitory representation, perhaps in a field of law in which he has little personal interest or current familiarity. Effective representation today requires counsel experienced in the particular field of law involved. (Cf. Lucas v. Hamm, 56 Cal. 2d 583 [15 Cal. Rptr. 821, 364 P.2d 685 (1961)]; People v. Ibarra, 60 Cal. 2d 460 [34 Cal. Rptr. 863, 386 P.2d 487 (1963)].) Yet to acquire this experience and maintain an acceptable level of competency in a given field of the law demands continuous study, application, and practice. We think the days are past when a lawyer could be expected to do this solely as a public service. If society is to demand representation by counsel in an expanding variety of proceedings and to insist on a high level of competency in the performance of such representation, then counsel should be paid. Is it reasonable today to attach to a statute which provides for court-appointed counsel in a custodial proceeding an interpretation that appointed counsel will render his services for nothing?

Id., 269 Cal. App. 2d at 499.

Our concept of what competent representation requires has also changed. The suggestion that the representation of indigent clients is "less burdensome" because their cases are "less complex" may actually reflect an unstated double standard of competency. How complex or burdensome a case may be should have little to do with the breadth of the client's wallet. The assignment of appointed clients on the theory that their cases are "less complex" frequently becomes a self-fulfilling prophecy. Their cases never become "complex" because the lawyers are not motivated to probe any possible complexities. The United States Court of Appeals for the District of Columbia recently struggled with this unstated double standard in an appeal from a summary judgment against a group of lawyers who were required to

take parental neglect cases pro bono as a condition to being appointed to compensated cases in the D.C. Family Court. The trial court concluded that this obligation was not a "burdensome" taking, because "neglect cases do not usually require substantial research and investigation efforts." Family Division Trial Lawyers v. Moultrie, 725 F.2d 695, 709 n.19 (1984). In reversing the grant of a summary judgment, the court of appeals suggested that the burden should be measured in terms of the services as they should be performed under adequate professional standards:

> But there is a more fundamental reason why we cannot accept the district court's grant of summary judgment. The stakes in the case are too great not only for the lawyers and court personnel but also for the parents and children involved in neglect cases to let stand a judgment mistakenly entered without any

> judicial inquiry upon "facts"--that representation of parents in neglect cases entails minimum time and effort and need exact no substantial premium in time or talent from legal advocates--which are widely perceived in the local bar and in the community at large, not to be true, and which have been the core of a decade-old controversy. Such a judicial affirmation made without an adequate inquiry into these facts' truth or falsity would, we fear, invite disrespect of the courts and undermine the credibility of their procedures.

Id. at 708-09 (footnote omitted).

A return to the use of mandatory uncompensated appointments as a solution to the problem of providing counsel to indigents creates a substantial risk of institutionalizing a double standard of competency.[3] Taking this step requires

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[3] For this reason, amici takes a dim view of the appointment of counsel without compensation in criminal cases. This issue is not before the court.

the rejection of the accumulated wisdom of a century's experience, not only in America [see Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice, pp. 34-35 (1963); A.B.A. Standards Relating to Providing Defense Services, Section 2.4 (1967)], but throughout the civilized world [see Lord Parker, The Development of Legal Aid in England since 1949, 48 A.B.A.J. 1029 (1962)].

II. AN APPOINTMENT WHICH MAKES NO PROVISION FOR REIMBURSEMENT OF OUT-OF-POCKET EXPENSES MAY REQUIRE REJECTION BY A LAWYER.

It is essential to carefully separate the issues raised by failure to compensate appointed counsel from the very different issues raised by failure to reimburse counsel for the costs and

expenses of litigation. The appointment as counsel in this case will require litigation of a civil rights suit involving several parties, extensive discovery, numerous witnesses, and complex factual issues requiring consultation with experts. Obviously, the expenses involved in deposition costs and fees for investigators and experts could be substantial. To require appointed counsel to pay these expenses out of his own pocket would create a significant conflict of interest and violate the constitutional guarantee that property will not be taken without due process of law. Even if this Court were to conclude that appointed attorneys are obligated to offer their services without compensation, this obligation cannot be expanded to include liability for the expenses incurred in providing

representation without creating a serious ethical dilemma for appointed counsel.

The distinction between compensation for services and reimbursement for expenses finds deeply rooted support in the ethical canons which have traditionally guided the legal profession. Canon 42 of the Canons of Ethics, adopted by the American Bar Association in 1928, provided:

> A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

In Opinion 259, this Canon was construed by the A.B.A. Committee on Professional Ethics and Grievances to preclude lawyers doing volunteer legal work for servicemen from directly advancing costs without an agreement for reimbursement:

> We think, however, it would not prohibit the committee [on war work] from advancing costs in indigent cases out of funds provided for that purpose and, of course, a lawyer member of the committee could subscribe to such a fund if he so desired.

The same proscription was carried forward into the Code of Professional Responsibility which the A.B.A. promulgated in 1969. The disciplinary rules codified under Canon 5, which addresses conflicts of interest, included DR 5-103, Avoiding Acquisition of Interest in Litigation:

> (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, <u>provided the client</u>

remains ultimately liable for such expenses. [Emphasis supplied.]

It is important to recognize that the prohibition of the lawyer's payment of costs and expenses of litigation has always co-existed with rules allowing contingency fee agreements, although both give a lawyer an interest in the litigation. This dichotomy was directly addressed in the Ethical Considerations offered to explicate Canon 5:

> EC 5-7 . . . Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

> EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

One can certainly question the significance of this distinction where the lawyer represents a plaintiff in a suit for damages. In that instance, the interests of the lawyer and the client largely coincide: if the case is successful, the lawyer is assured of both his fee and reimbursement of expenses, and if the case is not successful, the lawyer's claim for reimbursement of expenses may not be worth much. There

may be a difference in the appearance of propriety between cash outlays for a client and the devotion of hours without billing. But the real risk of conflict seems academic. A lawyer who willingly invests many hours of time in a case is unlikely to jeopardize his client's interests, and his own, by not undertaking discovery or retaining necessary experts simply to avoid the expense.[4]

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[4] These considerations led to a revision of the A.B.A. provisions in the Model Rules of Professional Conduct adopted in August 1983. Rule 1.8(e) now provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and

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> expenses of litigation on behalf of the client.

Subsection (e)(1) simply recognizes that the distinction between a contingent fee for services and contingent reimbursement of expenses is hardly a difference worth preserving. Rule 1.5 requires, however, that contingent fee agreements clearly specify whether litigation expenses are to be deducted "before or after the contingent fee is calculated," and the comment to the rule cautions lawyers that:

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way inimical to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise the client might have to bargain for further assistance in the midst of a proceeding or transaction.

Subsection (e)(2), of course, goes no further than Opinion 259, supra, in permitting a lawyer to voluntarily

Representation of plaintiffs in a civil rights case, however, raises different considerations. The primary relief sought may be injunctive. A pervasive conflict of interest casts its cloud in making dozens of tactical decisions. Should the deposition of a particular witness be taken? Should an expert be consulted or retained? Each such decision requires the lawyer to reach for his own wallet, and ask himself, "Can I really afford this?"

Quite apart from the ethical dilemma of conflicting self-interest created by appointment of counsel without reimbursement for expenses, is the constitutional problem of taking counsel's property without due process of law. In State ex rel. Wolff v. Ruddy,

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contribute court costs, in addition to contributing his services.

617 S.W.2d 64 (Mo. 1981), the Missouri Supreme Court, while upholding a plan requiring counsel to provide services to indigents without compensation, held that this plan could not require attorneys to advance personal funds for costs or expenses. Id. at 67. In Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982), a writ of habeas corpus was granted to an attorney who had been held in contempt by a Missouri judge for refusing to accept an appointment as counsel which would require him to advance costs of taking depositions, hiring an investigator, and retaining experts to evaluate laboratory evidence. Id. at 121-13, 1216. The court concluded:

> Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is, however, constitutionally distinct from merely compelling lawyers to provide their services.

> Expenses might include investigatory services, deposition costs, witness fees, payment of expert witnesses, and similar outlays. While we understand that in many cases, because of lost opportunities and payment of fixed costs, the burden of providing services without compensation is comparable to that of paying expenses, lawyers have no duty to pay expenses. The class of lawyers has no more obligation to pay such expenses than any other class of citizens. Compelling individual attorneys to bear such costs raises serious due process issues. . . . Counsel's rights were violated when he was asked to pay the expense involved in defending an indigent and held in contempt when he refused to assume the defense under these conditions.
>
> Thus, although we find Missouri has adopted a constitutional procedure, we hold the trial court impermissibly failed to implement that procedure by denying counsel's request for an order requiring the State to pay his expenses or upon the State's failure to so pay, that the court discharge the accused. If this procedure had been followed, counsel would have been relieved of his appointment. This did not happen. Counsel was thus ordered to advance payment of funds necessary

> to the defense of the accused. We find that execution of this order would constitute a "taking" of counsel's property without just compensation in violation of the due process clause of the fourteenth amendment.

Id. at 1215-16 (emphasis supplied).

The Supreme Court of New Hampshire recently agreed with both of these opinions in holding that a denial of full reimbursement of expenses to an attorney appointed to represent an indigent was an unconstitutional taking of property. State v. Robinson, 465 A.2d 1214, 1217 (N.H. 1983). In addition to Missouri and New Hampshire, three other states which have rejected a right of compensation for the services of appointed counsel have carefully distinguished counsel's right to reimbursement for out of pocket expenditures. People v. Kinion, 454 N.E.2d 625, 630-32 (Ill. 1983); State v. Second Judicial District Court, County of

Washoe, 453 P.2d 421, 422-23 (Nev. 1969); State in Interest of Antini, 251 A.2d 219, 294 (N.J. 1969); State v. Rush, 217 A.2d 441, 450 (N.J. 1966); State v. Horton, 170 A.2d 1, 9-10 (N.J. 1961).

The right to competent counsel is a meaningless gesture if counsel for an indigent plaintiff is denied the use of working tools essential to the establishment of a tenable claim. To require appointed counsel to supply these tools out of his pocket, however, would impose an intolerable conflict of interest upon the client, and an unconstitutional deprivation of property upon counsel.

III. THE ETHICAL DUTY TO "NEVER REJECT . . . THE CAUSE OF THE DEFENSELESS OR OPPRESSED" DOES NOT MANDATE THE ACCEPTANCE OF ALL COURT-APPOINTED CLIENTS.

In rejecting the petitioner's motion to dismiss the order of appointment, the district court explicitly relied upon its prior unpublished opinion in Coburn v. Nix, Civ. No. 86-716-B. There, principal reliance for the appointment power was posited on the Oath of Admission to practice in the Southern District of Iowa, whereby a lawyer pledges to "never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." Local Rule 1.5.5, United States District Court for Southern District of Iowa.

It is respectfully suggested that this oath lends no support whatever to

the proposition that lawyers owe an obligation to accept appointments to represent indigent clients. The oath simply recycles an Oath of Admission to the Bar which was first formulated for use in the state of Washington, and was adopted by the American Bar Association in 1908. See 33 Reports of the A.B.A. 584 (1908). Many other states still have a virtually identical statutory provision. See, e.g., Ore. Rev. Stat., Section 9.460.(8). The provision describing the duty not to reject the cause of the defenseless or oppressed was clearly not intended to address the question of representation of indigents, but simply to describe the lawyer's obligation to represent the unpopular client. No better evidence of this can be found than the fact that, among the earliest states to adopt the oath by

statute were three states which have long recognized that attorneys appointed to represent indigents are constitutionally entitled to compensation: Iowa, Indiana and Wisconsin. 33 Reports of the A.B.A. 584 n.1 (1908). In Hall v. Washington Co., 2 Greene 473 (Iowa 1850), the Iowa Supreme Court concluded that court appointment of attorneys without compensation would violate the provision of the fifth amendment of the United States Constitution that private property shall not be taken for public use without just compensation.[5] Four years later, in 1854, the Supreme Court of Indiana held that appointments of lawyers without

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[5] In Samuels v. County of Dubuque, 13 Iowa 536 (1862), however, the court upheld a statutory limitation of $25 for fees for representing indigent defendants, holding that such representation was a duty of attorneys as "officers of the law."

compensation violated two provisions of its state constitution: a provision that "no man's particular services shall be demanded without just compensation," and "the fundamental law which provides for a uniform and equal rate of assessment and taxation upon all the citizens." Webb v. Baird, 6 Ind. 13 (1854). Likewise, the Supreme Court of Wisconsin relied on the fifth amendment principle of just compensation in holding that the power and duty to compensate appointed counsel arises out of the power to appoint. County of Dane v. Smith, 13 Wis. 654 (1861). Yet none of these three states saw any inconsistency in defining the duties of attorneys in precisely the same language utilized in the A.B.A. oath. Other states which have recently joined this growing minority also recognize the A.B.A. Code of Professional

Responsibility and utilize the A.B.A. Oath of Admission. These include Kentucky, Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. Ct. App. 1972), and Nebraska, Kovarik v. County of Banner, 224 N.W.2d 761, 764-65 (Neb. 1975). Even the state of Washington, where the oath originated a century ago, and is still required by both statute (Wash.Rev. Code Section 2.48.210 (1961)) and rule (Wash. Rules for Admission to Practice, Rule 5(G) (1965)), has joined the ranks of those states which no longer countenance the appointment of counsel to serve without compensation. Honore v. Washington State Board of Prison Terms & Paroles, 466 P.2d 485, 496 (Wash. 1970).

The true meaning of duty to never reject "the cause of the defenseless or oppressed" was explored by former Yale Law School Dean Eugene V. Rostow in the

Morrison Lecture presented to the State Bar of California in 1961. Describing the tradition of British barristers, who are obligated to take every case that walks in the door, he compared their role to that of a cab driver--"bound to answer at the first hale." Accompanying this tradition, however, is a governmental commitment to provide adequate compensation to the barristers who take on representation of the indigent. See Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, p. 37 (1963). Dean Rostow then compared the very different tradition of American lawyers:

> The code of ethics of the American Bar has never accepted the British rule in its full majesty, even in criminal cases. Canon 31 of the Canons of Professional Ethics adopted by the American Bar Association

> declares that "no lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment." The Canon stresses the lawyer's individual responsibility for accepting or declining requests for professional services. And it makes no reference, directly or indirectly, to the principle of the English rule as a factor the lawyer is to take into account in exercising his responsibility. It should be added, however, that the lawyer's oath, recommended by the American Bar Association, and widely used, contains these words: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." At least one authority has said that "where the English rule is obligation to accept except under special circumstances, the American rule is obligation not to refuse where special circumstances exist."

Rostow, The Lawyer and His Client, 48 A.B.A.J. 25, 29-30 (1962). Dean Rostow concluded that the oath simply describes the aspiration of American lawyers to

strive for the ideal personified by John Adams representing the British soldiers accused of the "Boston Massacre." (Adams, incidentally, was retained in that case for a one-guinea fee. Page Smith, A New Age Now Begins, vol. I, p. 346 (1976)).

IV. IMPOSITION OF A MANDATORY DUTY TO ACCEPT COURT-APPOINTED CLIENTS WOULD REQUIRE RECONSIDERATION OF THE DENIAL OF IMMUNITY FROM MALPRACTICE CLAIMS IN FERRI V. ACKERMAN.

The risks which a court imposes upon an unwilling

attorney with a mandatory appointment go far beyond the disruption of the normal lawyer-client relationship. The risks may extend to the harassment of subsequent malpractice suits. In Ferri v. Ackerman (1979) 444 U.S. 193, this

Court held that attorneys appointed to represent indigent clients in federal criminal proceedings are not entitled to the absolute immunity conferred upon judges and prosecutors. In doing so, however, the Court noted that the increased risk of malpractice liability for such lawyers was "not implausible":

> Respondent argues that there are valid policy reasons that justify an immunity for appointed counsel not accorded privately retained counsel. The claim is that a defendant's relationship with appointed counsel is substantially different than it would be with retained counsel because of the inability to choose and freely to discharge counsel. See, e.g., Criminal Justice Act Plan for the Western District of Pennsylvania Section IV A(3). The defendant would therefore tend to perceive appointed counsel as a representative of the government and to view him with suspicion. After conviction, a defendant's inevitable bitterness would lead to a high risk of retaliatory law suits, the same fear that underlies immunity

for judges and prosecutors. Butz v. Economou, 438 U.S. 478, 510, 57 L.Ed.2d 895, 98 S.Ct. 2894. Further, because of the increased risk of malpractice actions, appointed counsel would be more susceptible to pressure from clients to call additional witnesses or to make additional arguments that would in fact prejudice the defendant's own case. But respondent has not directed our attention to any empirical data--in judicial decisions, legislative hearings, or scholarly studies--to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation. Given the speculative, though not implausible, nature of respondent's arguments, we are unwilling to ascribe to Congress an intent to accord an immunity to appointed counsel not given retained counsel in the face of the silent legislative history on this point.

Id. at 200-01 n.17; cf. Tower v. Glover, 467 U.S. 914 (1984). Significantly, this Court avoided the problem in Ferri v.

Ackerman by assuming that lawyers were free to decline such appointments. Noting that the risk of malpractice liability must be offset by the level of compensation offered to ensure a supply of lawyers willing to accept appointments, the Court left that equation for Congress to resolve:

> Perhaps the most persuasive reason for creating such an immunity would be to make sure that competent counsel remain willing to accept the work of representing indigent defendants. If their monetary compensation is significantly less than that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disproportionately significant, it is conceivable that an immunity would be justified by the need to preserve the supply of lawyers available for this important work. Whether a sufficient need can be demonstrated that would justify such a rule, or whether such a problem might be better remedied by adjusting the level of compensation, are

> questions that can most appropriately be answered by a legislative body acting on the basis of empirical data.

Id. at 204-05. In the absence of such a legislative judgment, it would be incongruous to interpret Section 1915(d) to permit mandatory appointment of counsel. If no immunity is afforded, then every lawyer subjected to such an appointment is saddled with the additional burden of insuring himself against the increased risk to which he is exposed. If immunity is afforded, the indigent client is given less protection against incompetence than the non-indigent. The dilemma can only be avoided by making the same assumption which the Court made in Ferri v. Ackerman: the acceptance of a court appointed client is a voluntary act by the attorney, who willingly assumes all

the risks and the rewards that the ensuing lawyer-client relationship might bring.

CONCLUSION

Even if 28 U.S.C. Section 1915(d) is construed to permit "appointment" of lawyers to represent indigent plaintiffs, lawyers must remain free to decline such appointments. The nature of the attorney-client relationship and the ethical responsibilities of a lawyer may compel such action. The duty to represent the "defenseless and oppressed" certainly imposes no ethical obligation to accept appointments deemed unacceptable by the lawyer, and the denial of immunity from malpractice claims in Ferri v. Ackerman assumes that lawyers remain free to reject even appointments that are compensated.

From the standpoint of public policy, the assertion of judicial authority to mandate acceptance of court appointed clients may have disastrous consequences. Rather than meeting the need to supply indigents with lawyers, the assertion of this authority may seriously undermine the voluntary programs already in place to meet that need. These programs rely on the willingness of thousands of lawyers to make their services available at little or no charge. These lawyers, in turn, rely on the control they have over their own pro bono spigot. As long as they are free to reject a case that may be too burdensome or costly or that demand competence in unfamiliar terrain, they remain willing to accept their fair share of the work to be done. Once the courts establish a policy of mandatory pro bono,

and assert ultimate control over every lawyer's spigot, it can reasonably be anticipated that volunteer pro bono activity will decline dramatically. If every lawyer must be available to respond to the call of a court, then few lawyers will risk loading their calendars with cases which do not meet that mandatory obligation. A process of displacement could occur, by which the needs of those indigents--whose new "right to counsel" in civil cases would have been selectively recognized--will be met, while those not favored with such status are left unrepresented, even though they are no less, and frequently more, deserving. An affirmative ruling by this Court may very well cause the current level of public support for providing legal services to indigents to decline. There would be little incentive to spend

tax dollars to support legal aid programs if the courts had the power to supply lawyers by mandatory appointment. If our goal is to maximize the delivery of legal services to the indigent, a policy of mandatory court appointment may be the most costly, disruptive and inefficient alternative available.

Unless this Court provides for the appointment of counsel to <u>all</u> indigent civil litigants, individual courts will have to exercise discretion in determining which indigents will be able to obtain counsel. If the appointment of counsel were left to the discretion of the courts, as the request for counsel is now, the lack of definitive standards for the selection of counsel would result in arbitrary discrimination between litigants who a particular court decides are worthy of counsel and litigants who

are denied counsel. Allowing the courts wide discretion to appoint counsel in civil cases, without articulated, uniform standards to establish which indigents should have assistance of counsel in which cases, would have a negative impact on the fairness of the system. Congress, which is in the best position of balancing the issues involved, should be the body that promulgates such standards. Amici favor the establishment of uniform

standards for the appointment of compensated counsel in civil cases.

Respectfully submitted,

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